

1
2
3
4
5
6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
8

9 RONALD C. WILLIAMS,)
10 #87832)
11 Plaintiff,)
12 vs.)
13 RICHARD LIVERONI, *et al.*,)
14 Defendants.)
_____ /

3:10-cv-00422-LRH-VPC

ORDER

15 This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff's application
16 to proceed *in forma pauperis* is granted (docket #1). Based on the information regarding plaintiff's
17 financial status in the application to proceed *in forma pauperis*, plaintiff is required to pay an initial
18 installment of the filing fee pursuant to 28 U.S.C. §1915.

19 The grant of *in forma pauperis* status adjusts the amount of the filing fee that plaintiff must
20 *prepay* -- plaintiff will be required to prepay an initial installment of \$5.52, instead of having to prepay
21 the full \$350 filing fee for this action. The entire \$350 filing fee will, however, remain due from
22 plaintiff, and the institution where plaintiff is incarcerated will collect money toward the payment of the
23 full filing fee when petitioner's institutional account has a sufficient balance, pursuant to 28 U.S.C.
24 §1915. The entire \$350 filing fee will remain due and payable, and will be collected from plaintiff's
25 institutional account regardless of the outcome of this action. The court now reviews the complaint.

26 **I. Screening Standard**

27 Federal courts must conduct a preliminary screening in any case in which a prisoner seeks
28 redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. §

1 1915A(a). Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a
 2 prisoner's claims, "if the allegation of poverty is untrue," or if the action "is frivolous or malicious,"
 3 "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant
 4 who is immune from such relief." 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks
 5 an arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may,
 6 therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or
 7 where the factual contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a
 8 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson*
 9 *v. Arizona*, 885 F.2d 639, 640 (9th Cir. 1989).

10 Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided
 11 for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under Section
 12 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under Rule
 13 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*, 232
 14 F.3d 719, 723 (9th Cir. 2000). A complaint must contain more than a "formulaic recitation of the
 15 elements of a cause of action;" it must contain factual allegations sufficient to "raise a right to relief
 16 above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965
 17 (2007). "The pleading must contain something more...than...a statement of facts that merely creates a
 18 suspicion [of] a legally cognizable right of action." *Id.* In reviewing a complaint under this standard,
 19 the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex*
 20 *Hospital Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to
 21 plaintiff and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

22 Allegations in a *pro se* complaint are held to less stringent standards than formal pleadings
 23 drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21
 24 (*per curiam*); *see also Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).
 25 All or part of a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the prisoner's
 26 claims lack an arguable basis either in law or in fact. This includes claims based on legal conclusions
 27 that are untenable (*e.g.* claims against defendants who are immune from suit or claims of infringement
 28 of a legal interest which clearly does not exist), as well as claims based on fanciful factual allegations

1 (e.g. fantastic or delusional scenarios). *See Neitzke*, 490 U.S. at 327-28; *see also McKeever v. Block*,
 2 932 F.2d 795, 798 (9th Cir. 1991).

3 To sustain an action under section 1983, a plaintiff must show (1) that the conduct
 4 complained of was committed by a person acting under color of state law; and (2) that the conduct
 5 deprived the plaintiff of a federal constitutional or statutory right.” *Hydrick v. Hunter*, 466 F.3d 676,
 6 689 (9th Cir. 2006).

7 **II. Instant Complaint**

8 Plaintiff, who is incarcerated at Ely State Prison (“ESP”), has sued Nevada Department of
 9 Corrections (“NDOC”) Director Howard Skolnik, along with three members of the High Desert State
 10 Prison (“HDSP”) staff: Lt. Richard Liveroni, caseworker Larry Wuest, and Assistant Warden of
 11 Programs (“AWP”) Cole Morrow. Plaintiff alleges violations of his Fifth and Eighth Amendment rights
 12 as well as his Fourteenth Amendment rights to due process and equal protection.

13 Plaintiff alleges the following with respect to a disciplinary hearing that Lt. Liveroni conducted
 14 at HDSP on charges that plaintiff assaulted another inmate at ESP. Lt. Liveroni denied plaintiff his
 15 requested witness and refused to obtain a videotape from ESP that would have exonerated plaintiff.
 16 Plaintiff was found guilty of all charges, sentenced to 180 days lockdown confinement in the “hole” and
 17 charged restitution without a restitution hearing. Lt. Liveroni, whom plaintiff claims has a history of
 18 “over-flexing his authority on inmates,” then entered a sentence of one year in the hole—instead of 180
 19 days—into the prison computer system. Plaintiff grieved this issue and states that caseworker Wuest said
 20 that the warden orders him to deny all grievances. Plaintiff asserts that AWP Morrow and Wuest were
 21 aware of the violations of plaintiff’s constitutional rights related to these disciplinary sanctions and
 22 refused to “correct the issues.”

23 First, while plaintiff names NDOC Director Howard Skolnik as a defendant, “[l]iability under
 24 [§] 1983 arises only upon a showing of personal participation by the defendant. A supervisor is only
 25 liable for the constitutional violations of . . . subordinates if the supervisor participated in or directed
 26 the violations, or knew of the violations and failed to act to prevent them. There is no respondeat
 27 superior liability under [§] 1983.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (citations omitted);
 28 *see also Hydrick v. Hunter*, 500 F.3d 978, 988 (9th Cir. 2007); *Ortez v. Washington County, State of Or.*,

1 88 F.3d 804, 809 (9th Cir. 1996) (concluding proper to dismiss where no allegations of knowledge of
 2 or participation in alleged violation). Plaintiff merely alleges that Director Skolnik is responsible for
 3 the grievance procedures and for training his subordinates. Plaintiff does not describe any specific
 4 actions by Director Skolnik, nor does he allege that Director Skolnik had knowledge of or participated
 5 in any alleged civil rights violation. Defendant Skolnik is dismissed from this action.

6 Turning to the substance of plaintiff's claims, plaintiff alleges that the disciplinary hearing and
 7 sanctions imposed violated his due process rights under the Fourteenth Amendment. "Prisoners . . . may
 8 not be deprived of life, liberty or property without due process of law [T]he fact that prisoners retain
 9 rights under the Due Process Clause in no way implies that these rights are not subject to restrictions
 10 imposed by the nature of the regime to which they have been lawfully committed" *Wolff v.*
 11 *McDonnell*, 418 U.S. 539, 556 (1974). When a prisoner faces disciplinary charges, prison officials must
 12 provide the prisoner with (1) a written statement at least twenty-four hours before the disciplinary
 13 hearing that includes the charges, a description of the evidence against the prisoner, and an explanation
 14 for the disciplinary action taken; (2) an opportunity to present documentary evidence and call witnesses,
 15 unless calling witnesses would interfere with institutional security; and (3) legal assistance where the
 16 charges are complex or the inmate is illiterate. *See id.* at 563-70; *see also Superintendent, Mass. Corr.*
 17 *Inst., Walpole v. Hill*, 472 U.S. 445, 454 (1985); *Serrano v. Francis*, 345 F.3d 1071, 1077-78 (9th Cir.
 18 2003); *Neal v. Shimoda*, 131 F.3d 818, 830-31 (9th Cir. 1997); *Walker v. Sumner*, 14 F.3d 1415, 1419-20
 19 (9th Cir. 1994), *abrogated in part on other grounds by Sandin v. Connor*, 515 U.S. 472 (1995);
 20 *McFarland v. Cassady*, 779 F.2d 1426, 1428 (9th Cir. 1986), *abrogated in part on other grounds by*
 21 *Sandin*, 515 U.S. 472. With his allegations regarding the disciplinary hearing and restitution charged,
 22 plaintiff states claims under the Due Process Clause of the Fourteenth Amendment.

23 The Eighth Amendment prohibits the imposition of cruel and unusual punishments and
 24 "embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency." *Estelle*
 25 *v. Gamble*, 429 U.S. 97, 102 (1976).

26 [A] prison official violates the Eighth Amendment only when two requirements are met.
 27 First, the deprivation alleged must be, objectively, 'sufficiently serious[;]' a prison
 28 official's act or omission must result in the denial of 'the minimal civilized measure of
 life's necessities' The second requirement follows from the principle that 'only the
 unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To

violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.'

3 *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). With his allegations that Lt. Liveroni arbitrarily doubled
4 the length of time that plaintiff was sanctioned to confinement in the hole, he states an Eighth
5 Amendment claim.

6 Plaintiff claims, without elaboration, that his Fifth Amendment rights have been violated. The
7 procedural guarantees of the Fifth and Fourteenth Amendment's Due Process Clause apply only when
8 a constitutionally protected liberty or property interest is at stake. *See Ingraham v. Wright*, 430 U.S.
9 651, 672-73 (1977); *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972). "The Due Process Clause of the
10 Fifth Amendment and the equal protection component thereof apply only to actions of the federal
11 government-not to those of state or local governments." *Lee v. City of Los Angeles*, 250 F.3d 668, 687
12 (9th Cir. 2001) (citing *Schweiker v. Wilson*, 450 U.S. 221, 227 (1981)). Plaintiff does not allege that
13 any of the defendants are federal actors. Accordingly, plaintiff's Fifth Amendment claim is dismissed.

14 Plaintiff also claims that his Fourteenth Amendment equal protection rights have been violated.
15 “Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from
16 invidious discrimination based on race.” *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). Prisoners are
17 also protected by the Equal Protection Clause from intentional discrimination on the basis of their
18 religion. *See Freeman v. Arpaio*, 125 F.3d 732, 737 (9th Cir. 1997). To establish a violation of the
19 Equal Protection Clause, the prisoner must present evidence of discriminatory intent. *See Washington*
20 *v. Davis*, 426 U.S. 229, 239-40 (1976). Plaintiff has not alleged that defendants intentionally
21 discriminated against him based on race or religion, nor has he alleged any disparate treatment
22 whatsoever. Therefore, plaintiff’s Fourteenth Amendment equal protection claim is dismissed.

23 || III. Conclusion

24 **IT IS THEREFORE ORDERED** that plaintiff's application to proceed *in forma pauperis*
25 (docket #1) is **GRANTED**. Plaintiff **Ronald C. Williams, Inmate No. 87832**, will be permitted to
26 maintain this action to conclusion without prepayment of the full filing fee. However, plaintiff must pay
27 an initial installment of the filing fee in the amount of **\$5.52**. Plaintiff will not be required to pay fees
28 or costs, other than the filing fee, or give security therefor. This Order granting *in forma pauperis* status

1 shall not extend to the issuance and service of subpoenas at government expense.

2 **IT IS FURTHER ORDERED** that, even if this action is dismissed, or is otherwise
3 unsuccessful, the full filing fee shall still be due, pursuant to 28 U.S.C. §1915, as amended by the
4 Prisoner Litigation Reform Act of 1996.

5 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. §1915, as amended by the Prisoner
6 Litigation Reform Act of 1996, the Nevada Department of Corrections shall pay the Clerk of the United
7 States District Court, District of Nevada, the **\$5.52** initial installment of the filing fee, if sufficient funds
8 exist in plaintiff's inmate account. Thereafter, the Nevada Department of Corrections shall pay the
9 Clerk of the United States District Court, District of Nevada, 20% of the preceding month's deposits
10 to plaintiff's account (in months that the account exceeds \$10.00), until the full \$350 filing fee has been
11 paid for this action. **The Clerk shall send a copy of this order to Albert G. Peralta, Chief of Inmate**
12 **Services, Nevada Department of Prisons, P.O. Box 7011, Carson City, NV 89702.**

13 **IT IS FURTHER ORDERED** that the Clerk shall **FILE** the complaint (docket #1-1).

14 **IT IS FURTHER ORDERED** that plaintiff's claims against Howard Skolnik are dismissed.
15 Defendant Skolnik is **DISMISSED** from this action.

16 **IT IS FURTHER ORDERED** that plaintiff's Fifth Amendment claims are **DISMISSED**.

17 **IT IS FURTHER ORDERED** that plaintiff's Fourteenth Amendment equal protection claims
18 are **DISMISSED**.

19 **IT IS FURTHER ORDERED** that plaintiff's Fourteenth Amendment due process claims **may**
20 **proceed**.

21 **IT IS FURTHER ORDERED** that plaintiff's Eighth Amendment claims **may proceed**.

22 **IT IS FURTHER ORDERED** as follows:

23 1. The Clerk shall electronically serve a copy of this order, including the attached Notice
24 of Intent to Proceed with Mediation form, along with a copy of plaintiff's complaint, on the Office
25 of the Attorney General of the State of Nevada, to the attention of Pamela Sharp.

26 2. The Attorney General's Office shall advise the Court within **twenty-one (21) days** of the date
27 of entry of this order whether it can accept service of process for the named defendants. As to any of
28 the named defendants for which the Attorney General's Office cannot accept service, the Office shall

1 file, *under seal*, the last known address(es) of those defendant(s).

2 3. If service cannot be accepted for any of the named defendant(s), plaintiff shall file a motion
3 identifying the unserved defendant(s), requesting issuance of a summons, and specifying a full name
4 and address for said defendant(s). Plaintiff is reminded that, pursuant to Rule 4(m) of the Federal Rules
5 of Civil Procedure, service must be accomplished within one hundred twenty (120) days of the date the
6 complaint was filed.

7 4. If the Attorney General accepts service of process for any named defendant(s), such
8 defendant(s) shall file and serve an answer or other response to the complaint within **thirty (30) days**
9 following the date of the early inmate mediation. If the court declines to mediate this case, an answer
10 or other response shall be due within **thirty (30) days** following the order declining mediation.

11 5. The parties **SHALL DETACH, COMPLETE, AND FILE** the attached Notice of Intent to
12 Proceed with Mediation form on or before **thirty (30) days** from the date of entry of this order.

13 **IT IS FURTHER ORDERED** that henceforth, plaintiff shall serve upon defendants,
14 or, if an appearance has been made by counsel, upon their attorney(s), a copy of every pleading, motion,
15 or other document submitted for consideration by the court. Plaintiff shall include with the original
16 paper submitted for filing a certificate stating the date that a true and correct copy of the document was
17 mailed to the defendants or counsel for defendants. If counsel has entered a notice of appearance, the
18 plaintiff shall direct service to the individual attorney named in the notice of appearance, at the address
19 stated

20 therein. The court may disregard any paper received by a district judge or a magistrate judge that has
21 not been filed with the Clerk, and any paper which fails to include a certificate showing proper service.

22
23 DATED this 8th day of October, 2010.



24
25

LARRY R. HICKS
26 UNITED STATES DISTRICT JUDGE
27
28

1 _____
2 Name

3 _____
4 Prison Number

5 _____
6 Address

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Plaintiff, _____, _____
v. _____, _____
Defendants. _____

Case No. _____

**NOTICE OF INTENT TO
PROCEED WITH MEDIATION**

This case may be referred to the District of Nevada's early inmate mediation program. The purpose of this notice is to assess the suitability of this case for mediation. Mediation is a process by which the parties meet with an impartial court-appointed mediator in an effort to bring about an expedient resolution that is satisfactory to all parties.

1. Do you wish to proceed to early mediation in this case? Yes No

2. If no, please state the reason(s) you do not wish to proceed with mediation? _____

3. List any and all cases, including the case number, that plaintiff has filed in federal or state court in the last five years and the nature of each case. (Attach additional pages if needed).

4. List any and all cases, including the case number, that are currently pending or any pending grievances concerning issues or claims raised in this case. (Attach additional pages if needed).

1 _____
2 _____
3 5. Are there any other comments you would like to express to the court about whether this case is
4 suitable for mediation. You may include a brief statement as to why you believe this case is
5 suitable for mediation. (Attach additional pages if needed).
6 _____
7 _____
8 _____

9 **This form shall be filed with the Clerk of the Court on or before thirty (30) days from the
date of this order.**

10 Counsel for defendants: By signing this form you are certifying to the court that you have
11 consulted with a representative of the Nevada Department of Corrections concerning participation in
12 mediation.

13 Dated this _____ day of _____, 20_____.
14 _____
15 _____
16 Name of person who prepared or
17 helped prepare this document
18
19
20
21
22
23
24
25
26
27
28